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NO. [redacted]

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

WILLIAM MITCHELL HOOD,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, William Mitchell Hood, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on February 13, 1970.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 422 F.2d 737, and are reprinted as Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on February 13, 1970. A timely Petition for Rehearing was filed, but was denied on March 26, 1970. (Appendix C, *infra.*). Circuit Justice Marshall entered an order on April 16, 1970, extending the time for filing this Petition to and including May 25, 1970. The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the bare statement, in an affidavit for a search warrant, that property "known" by the affiants and informants to have been stolen is on the premises to be searched provides an adequate basis from which a magistrate can independently conclude that this property was stolen?

2. Whether an affidavit based on hearsay information provided by three unnamed informants and asserting merely that these informants were "reliable" and that one had furnished reliable information "on various occasions in the past" provides an adequate basis from which a magistrate can independently conclude that the informants are reliable?

3. Whether the admission of incompetent hearsay evidence to show the theft and interstate transportation of two of the three vehicles involved in the trial of the indictment prejudiced the jury in its consideration of whether the defendant possessed any one of the vehicles knowing it was stolen?

4. Whether the instruction that the jury can infer knowledge of the stolen character of property from the defendant's unexplained recent possession denies due process of law by permitting the drawing of an irrational deduction as to guilt?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure, in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

Section 2313, Title 18, United States Code, provides:

> § 2313. Sale or receipt of stolen vehicles.
>
> Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner, the president and general manager of Frigid Food Express, Inc., a trucking firm doing business in Westville, Indiana, and Louisville, Kentucky, was indicted by the Grand Jury of the United States District Court for the Northern District of Indiana, South Bend Division, for three separate, but similar, violations of Section 2313, Title 18, United States Code.

Count One charged that Petitioner received and concealed a stolen 1963 Mack Tractor, which was moving

in commerce from Louisville, Kentucky, to Westville, Indiana, and which he knew was stolen. Count Two charged a similar receipt and concealment of a 1966 Mack Tractor, which was moving in commerce from Chicago, Illinois, to Westville, Indiana. Count Three charged a similar receipt and concealment of a 1961 Mack Tractor, which was moving in commerce from Calumet City, Illinois, to Westville, Indiana. (R. 2; A. 100).[1]

Prior to trial, Petitioner moved to suppress all evidence, which included the three trucks in question, seized in a search of the Frigid Food Express trucking terminal at Westville, Indiana, under the authority of a search warrant. (2316 R. 27-9; A. 97-9.)[2] After a hearing, at which the district judge heard testimony from the applicants for the search warrant and the United States Commissioner who issued the warrant, the motion was denied. (Tr. 70-1; A. 16).[3]

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[1] "R. —" references are to the page of the trial record filed in the Court of Appeals. "A. —" references are parallel, and refer to the page of the Appendix filed in the Court of Appeals pursuant to the Federal Rules of Appellate Procedure.

[2] "2613 R. —" references are to the page of the trial record in a preceding cause during which a motion to suppress this same evidence was made and denied. After the instant indictment superseded that cause, the Petitioner's earlier motion, the hearing of that motion and the trial judge's ruling were incorporated into and allowed to stand in the instant case. (Tr. 5) Pertinent portions of the record in the former cause were included in Appellant's Appendix, and, hence, the parallel reference.

[3] "Tr. ....." references are to the page of the transcript of evidence at trial, also filed in the Court of Appeals. Parallel Appendix references are also provided.

Following jury verdicts of guilty on each count, Petitioner was sentenced to the custody of the Attorney General for a period of three years, the terms on Counts Two and Three to be served concurrently with the term on Count One. The Court of Appeals held, however, that the conviction on Count Three was not supported by adequate competent evidence and reversed the conviction on that count without disturbing the sentence which had been imposed. (App. A, *infra*, pp. 6, 10)

The following facts are presented in the same order as the Issues to which they relate.

1. The affidavit for the search warrant by virtue of which the three tractors were seized from Petitioner's premises did not state sufficient underlying circumstances for the issuance of the warrant.

Robert E. Radde, an agent of the Federal Bureau of Investigation, and Lee H. Cole, a detective sergeant of the Indiana State Police, executed an affidavit for a search warrant before the Honorable Roger F. Gay, United States Commissioner for the Northern District of Indiana. This affidavit described information purportedly[4] given the two officers by three separate anonymous informants and contained the affiants' conclusion that certain described property was stolen.

The affiants stated that the first informant, who was described as "reliable" and whose reliability was asserted to rest on the fact that "on various occasions in the past

[4] At the hearing, Agent Radde admitted that the affidavit was incorrect in stating that the first informant had given information to Cole and him. The information attributed to this informant had been supplied by a Chicago F.B.I. agent who had received it from the informant. (Tr. 55-7; A. 9-10)

[he had] furnished information leading to the recovery of similar type stolen property," told them he had seen certain described tractors on the Frigid Foods premises from July, 1967, to February, 1968. The affiants said they knew these tractors had been stolen, but they did not elaborate on how they had arrived at this conclusion. (A. 92)

The affidavit further recited that a second informant, "believed" by the affiants to be "reliable," had told the two officers that employees of Frigid Foods were engaged in the business of stealing and altering tractors and trailers, and that he had observed one tractor which had been stolen in Cincinnati, Ohio, and three stolen in Chicago, Illinois, at the premises on February 11, 1968. Two of the last three described tractors were involved in the indictment.[5] (A. 93)

With respect to the third informant, the affidavit stated, "Another informant, believed by your affiants to be reliable, has stated that he has observed * * * tractors and trailers known by him to have been stolen * * *" being used by Frigid Foods. (A. 93)

Before issuing the warrant requested by the officers, the Commissioner conducted an informal inquiry, not under oath, for approximately fifteen to twenty minutes. (Tr. 22, 40, 54-5; A. 2-3, 7-9). Afterwards, Radde and Cole were placed under oath and they signed their affidavit. (Tr. 60; A. 13) The Commissioner then issued two identical search warrants, one for the Frigid Food premises and the other for the Triangle Garage in Walkerton, Indiana, from which

---

[5] These were units number 141 and number 311, the subjects of Counts Three and One, respectively. However, the indictment and the testimony described unit 311 as having been stolen in Louisville, Kentucky, (R. 2; Tr. 198; A. 25-6, 100), not in Chicago as the informant purportedly said.

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no property was recovered. Although the Commissioner testified that he issued the warrants, not on the basis of the affidavit alone, but on the basis of the affidavit together with the responses of Cole and Radde during the informal inquiry[6] (Tr. 22; A. 3), and the District Judge sustained the warrant and the validity of the search on the basis of the affidavit and the hearing which had been conducted (Tr. 70-71; A. 16), the majority tacitly recognized that the validity of the warrant could only be judged on the contents of the affidavit and held that the affidavit adequately set forth underlying circumstances from which the Commissioner could reach an independent judgment that the vehicles were stolen and that the informants were reliable. (App. A. *infra*, pp. 3-4)

Judge Will, dissenting, felt there was "no underlying information as to how any of the informants or the affiants knew any of the tractors in question were stolen. * * * The Commissioner apparently simply accepted the conclusory averments in the joint affidavit without learning any 'underlying circumstances'." (App. A. *infra*, p. 12) Similarly, he rejected the majority's holding that sufficient facts showing the reliability of the informants had been set forth in the affidavit: "The majority, apparently recognizing that none of these [averments concerning the reliability of the informants] alone is an adequate basis to establish the reliability of any of the informants, concludes

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[6] At the hearing, the Commissioner could not recall exactly what facts other than those set forth in the affidavit had been revealed during the informal inquiry. (Tr. 26; A. 3) Cole testified that everything he said at that time was contained in the affidavit. (Tr. 35-9; A. 6-7) Radde testified he gave the Commissioner additional information concerning the third informant. (Tr. 59; A. 12)

that the fact that all three allegedly gave similar information establishes their reliability. But nothing plus nothing plus nothing is still nothing." (App. A, *infra*, p. 13)

2. The admission of incompetent hearsay evidence to show theft and interstate transportation of two of the three vehicles involved in the trial was prejudicial.

All tractors of the type described in the indictment have an identifying serial number engraved at two locations on the vehicle: on the frame on the underside of the cab, and on a metal plate affixed to the door. (Tr. 133; A. 16-7) The same number is never given to two tractors of the same year and model type. However, different models built in the same year could have the same last four or five digits. (Tr. 564-5).

Count One involved a 1963 Mack Tractor, serial number F 609 T 1674. (R. 16; A. 101) Adequate and competent proof of ownership, theft on February 10, 1968, and interstate transportation was introduced. (Tr. 192-3, 197-8; A. 24-7). A 1963 Mack Tractor was found during the search of the Frigid Food terminal on March 7, 1968. This vehicle bore a Kentucky license plate which had been issued to Frigid Food for a 1958 Mack Tractor whose serial number concluded with the numbers 21962. (Tr. 132, 134, 139; A. 16-7)

The door post serial number of the 1963 tractor was B 61 T 21962. The number engraved on the frame was F 609 T 1674. (Tr. 133, 255; A. 16-7, 29) This tractor had "Frigid Food Express" and unit number "311" painted on the cab. During the period in question, only Petitioner and Ralph Bean, the secretary-treasurer of the corporation, had authority to purchase tractors. (Tr. 583;

A. 84) Bean testified he did not know anything about the purchase of a 1963 Mack Tractor bearing serial number F 609 T 1674. (Tr. 582; A. 83-4)

Count Two involved a 1966 Mack Tractor, serial number 719 LST 1033. (R. 16; A. 101) The Government's proof concerning theft and interstate transportation of this vehicle was conflicting. Although ownership was stipulated (Tr. 243; A. 26-7), the owner of the vehicle, or its driver, did not testify. Over defense objection (Tr. 255-9; A. 30-2), an agent for the National Auto Theft Bureau testified they had received a report from the Chicago Police Department that this vehicle was stolen in Chicago on August 28, 1967, the date charged in the indictment. (Tr. 258-9; A. 31-2)

Lehman K. Casey, a former Chicago police officer discharged because of his suspected involvement in a fake accident ring and currently serving a ten year sentence in the Federal Penitentiary at Leavenworth, Kansas, for smuggling heroin into the United States (Tr. 376-80; A. 47-50), testified that he had helped deliver a "1966 or 1967" F-model green, Mack Tractor to Hood in February or March of 1968. He and one Paul Lawrence had stolen this tractor in Chicago in February, 1968; the two men drove the tractor directly to Harvey's Garage in Dyer, Indiana (Tr. 361-2, 391; A. 41, 50).

At Harvey's Garage the tractor was painted red and the front wheels replaced. Carey said that Harvey, the owner of the garage, told him he was removing the vehicle identification number from the frame (Tr. 369; A. 44). Harvey paid Lawrence's wife $2,000 for the tractor (Tr. 392; A. 51).

Casey and one Jerry Green then allegedly drove the tractor to Frigid Food Express terminal in Westville, Indiana, in late February or early March, 1968 (Tr. 391; A. 50). Hood was to purchase the tractor from Harvey, and Casey and Green were to lease it from Hood. (Tr. 393-4; A. 51-2) Casey testified that Hood registered the truck in the name of Jack Bell, a fictitious character whom Casey had thought up with the approval of Hood and Green in approximately September, 1967. (Tr. 363, 603-5; A. 42-3, 88).

Casey also testified that prior to the alleged delivery of the tractor, Hood had told him that, "* * * he would take certain trucks * * * if he could get them" (Tr. 357; A. 40). Casey said that Hood told him that, "* * * most of his tractors were not completely Kosher" (Tr. 372; A. 44). Hood allegedly placed orders with Casey for various types of tractors, offering to pay two thousand dollars for vehicles worth twenty thousand dollars (Tr. 373-4; A. 45).

Casey had been promised by both the F.B.I. and the United States Attorney prosecuting the case that a letter would be written to his parole board notifying them that he had testified for the government (Tr. 375; A. 46).

A red 1966 Mack Tractor was found on Frigid Food's premises. (Tr. 142, 253; A. 18, 29) The vehicle had an Indiana license plate registered to Jack Bell for tractor number F 609 ST 1812. (Tr. 145-6; A. 18-9)

The door-plate number of the vehicle had been altered and could not be conclusively determined. Radde believed the number was either F 609 ST 1812 or 1818. (Tr. 149; A. 20) The frame serial number had been ground off and was not legible. Through a technique called "acid etching" the numbers "LST 1033" were raised from the frame. (Tr. 142, 250-2; A. 18, 27-8)

Count Three involved a 1961 Mack Tractor, serial number G 753 LST 1418 (R. 16; A. 101) The Court of Appeals held that the proof of theft and interstate transportation, made from insurance company records, was incompetent, and the judgment on this count was reversed. (App. A, *infra*, p. 6)

Nevertheless, the jury heard testimony that a 1961 Mack Tractor was found during the search. (Tr. 282, 297; A. 34, 37) This vehicle bore Indiana license plates issued to a 1962 Mack Tractor, serial number G 754 LT 1573, registered to Frigid Food Express, Inc. (Tr. 297, 283, 303; A. 34, 37-8).

The door post serial number on the tractor was 673 LST 1498. (Tr. 283, 298; A. 34, 37) The serial number engraved on the frame had been ground off, and only the number "1" was visible (Tr. 282, 298; A. 34, 37). The acid etching procedure raised the number "LST 1418" on the frame. (Tr. 311-2; A. 38-9).

Ralph Bean said he knew nothing of the purchase of the tractor described in Count Three (Tr. 583; A. 84). However, Bean also testified that he had purchased a 1960 Mack tractor and a 1962 Mack tractor which together were rebuilt by a mechanic named Davis into one vehicle which was registered as a 1962 model (Tr. 560-1; A. 78-9). The new vehicle was registered as G 753 LT 1573, and carried the company unit number 141 (Tr. 562-3, 566; A. 79-80).

3. An instruction to the jury that they could infer guilty knowledge from possession of recently stolen property denied Petitioner due process of law.

The jury was instructed on the subject of possession of stolen property as follows:

Knowledge may be proven by Defendant's conduct, and by all the facts and circumstances surrounding the case. No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate.

Possession of property recently stolen, if not satisfactorily explained, is a circumstance from which the Jury may reasonably draw the inference and find that the person in possession knew the property had been stolen. The same inference may reasonably be drawn from a false explanation of such possession.

Possession in one State of property recently stolen in another State, if not satisfactorily explained, is a circumstance from which the Jury might reasonably draw the inference and find, in the light of surrounding circumstances, that the person in possession knew it to be stolen property.

The term "recently" is a relative term which has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all the facts and circumstances shown by the evidence. The longer the period of time since the theft, the weaker the inference which may be drawn from unexplained possession.

If you find from the evidence beyond a reasonable doubt that the motor vehicles described in the Indictment were stolen, and were transported in interstate commerce as charged, and that, while recently stolen, the motor vehicle

was in the possession of the accused in another State than that in which it was stolen, the Jury would be justified in drawing from those facts the inference that the motor vehicles were received by the accused with knowledge that they were stolen, unless possession of the recently-stolen property by the accused in such other State is explained to the satisfaction of the Jury by other facts and circumstances in evidence.

In considering whether possession of recently-stolen property has been satisfactorily explained, the Jury will bear in mind that in the exercise of Constitutional rights, the accused need not take the witness stand and testify.

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused.

It is the exclusive province of the Jury to determine whether the facts and circumstances shown by the evidence warrant any inference which the law permits the Jury to draw from possession of recently-stolen property.

If any possession the accused may have had of recently-stolen property is consistent with innocence, the Jury should acquit the accused. (Tr. 697-9; A. 89-90)

REASONS FOR GRANTING THE WRIT

1. **The affidavit for a search warrant by virtue of which three tractors were seized from Petitioner's premises did not state sufficient underlying circumstances for the issuance of the warrant.**

In *Aguilar* v. *Texas*, 378 U.S. 108 (1964), the Court, following earlier precedent which had recognized that the Constitution requires decisions by magistrates rather than by police officers or informants in matters affecting Fourth Amendment rights (*Giordenello* v. *United States*, 357 U.S. 480 (1958); *Johnson* v. *United States*, 333 U.S. 10 (1948)), held that before a magistrate can issue a search warrant he "must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant * * * was 'credible' or his information 'reliable.'" 378 U.S. at 114. See also, *Spinelli* v. *United States*, 393 U.S. 410 (1969); cf. *McCray* v. *Illinois*, 386 U.S. 300, 304 (1967). This Petition questions, first, whether it is not also necessary, in the case of a warrant to search for stolen property, that the magistrate be informed of some of the underlying circumstances from which the affiants, or informants, concluded that the property for which the warrant was to issue was stolen; and, second, the extent of the circumstances which must be related to show reliability.

A. Whether the affidavit must contain facts or circumstances enabling the magistrate to reach an independent conclusion as to the character of the property to be seized under the warrant is a question which has largely gone

unanswered. Generally, in those situations involving narcotics and other self-evident contraband, the question never arises. It is usually clear from the description of the informant in the affidavit that he himself is a user of narcotics and is therefore familiar with the character of the substance which he has identified as a narcotic. Cf. *Jones* v. *United States*, 362 U.S. 257, 267 n. 2 (1960).

The situation is different where alleged obscene material is the subject of a search warrant. Admittedly, First Amendment considerations are involved, but the Court has recognized the dangers inherent in allowing warrants to issue "on the strength of the conclusory assertions of a single officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene." *Marcus* v. *Search Warrants of Property, etc.*, 367 U.S. 717, 732 (1961). We do not suggest, of course, that there need be the same type of judicial inquiry in a case not involving First Amendment rights, but the principles are the same. If seizure of property is to be based upon its character as contraband, or the proceeds of a theft, then the magistrate should be advised in the affidavit of some of the underlying circumstances which support the affiant's conclusion as to the character of the property.

Rugendorf v. *United States*, 376 U.S. 528 (1964), to which the majority opinion refers (App. A, *infra*, p. 3) in rejecting Petitioner's argument that the affidavit did not contain sufficient factual averments to allow the Commissioner to reach an independent conclusion as to the character of the property to be seized, actually illustrates the application of this principle. It should be noted that Petitioner has not and does not maintain that the informant, or anyone else, must know, on the basis of personal knowledge, that the property to be seized is stolen. What

is necessary is that the magistrate be given facts from which he can conclude that the property is stolen, and conclusory statements to the effect that the property is stolen do not perform that function. Recognizing this, the agents in *Rugendorf* supported their own conclusion that the furs in question were stolen by the statement of another F.B.I. Agent detailing the recent theft of approximately the same number of furs, a further statement that this was the only reported burglary in the United States in the previous six months involving furs of the same description and value as those on the premises, and the statement of a reliable informant that he had been told the furs on the defendant's premises were stolen. 376 U.S. at 530-1. See also, *United States* v. *Roth*, 7th Cir. 1967, 391 F.2d 507, 508 n. 1.

As the dissent in this case explains, the affidavit submitted to the Commissioner left him with no opportunity to make the independent judgment which the Constitution requires him to make. He had one of two alternatives: he could believe the statement that the property was stolen, or he could disbelieve it. But neither choice would be informed. In sum, the affidavit satisfies sort of a rubric by averring all of the conclusions which the Commissioner is required to make, but it does not state facts or circumstances which would support such conclusions.

B. What underlying circumstances serve to establish the reliability of an informant is, perhaps, incapable of precise definition. In this case, the majority of the Court of Appeals has said that a statement that an informant has, "'on various occasions in the past furnished information leading to the recovery of similar type of stolen property'' perhaps constitutes a sufficient underlying circumstance to meet the *Aguilar* requirement. (App. A, *infra*, pp. 3-4) This blanket-type statement has been tacitly rejected by state court decisions (*cf. People* v. *Parker*, 42 Ill.2d 42,

245 N.E.2d 487 (1969)) and, on one occasion, by the Seventh Circuit. *United States* v. *Roth*, 7th Cir. 1967, 391 F.2d 507. The vice of the statement is that, in its generality, it reveals nothing about the overall accuracy of the past information and the informant's reliability. Thus, in this case, it was literally possible for the informant to have furnished information on hundreds of occasions, but to have given accurate information which led to the recovery of property on only three or four.

Possibly as a consequence of this, the majority rested its decision on the fact that the statements of the other two informants tended to corroborate the first informant. Each of these informants were described as "reliable" without any factual basis for this description being set forth. Moreover, the third informant did not give any specific information, but merely stated that he had seen "tractors and trailers known by him to have been stolen * * *" used in the company's business. (A. 92) Although the second informant described four tractors which he claimed were stolen, only two might possibly have been among the six described by the first informant. Thus, the only allegation which the three informants made in common was that there were stolen tractors on Frigid Food's premises—and this claim was not corroborated by any recitals showing that thefts of such tractors as were described had actually taken place.

While *Rugendorf* v. *United States*, 376 U.S. 528 (1964), recognized that corroborative statements from additional informants might contribute to the reliability of each, there was, in that case, a positive statement concerning the reliability of each and corroborative details supplied by agents of the F.B.I. Recognizing this, the dissent tersely characterized the situation here: "* * * nothing plus nothing plus nothing is still nothing." (App. A, *infra*, p. 13)

The affidavit in this case was described by the dissent as a "formalistic exercise." Borrowing from that phrase, it is respectfully submitted that the ritual of filling out the following form of affidavit is all that need be done to satisfy constitutional requirements if the decision of the majority in this case correctly expresses the extent to which a magistrate must be advised of underlying circumstances:

> "The undersigned has reason to believe that [description of property] is located at [description of place to be searched]; your affiant knows that said property is (stolen) (contraband) (counterfeit) (obscene) (if other, specify: .....). The reason for your affiant's belief are as follows: A reliable informant told your affiant on [insert date] that he saw said property at the described premises on [insert date]. Said informant has, on various occasions in the past, furnished information leading to the recovery of similar types of (stolen) contraband) (counterfeit) (obscene) (if other, specify: .....) property."

2. The admission of incompetent hearsay evidence to show theft and interstate transportation of two of the three vehicles involved in the trial was prejudicial.

The Court of Appeals recognized that incompetent evidence had been introduced to prove Counts Two and Three, reversed Count Three because of such proof, but held that Count Two had been established by other competent proof. (App. A, *infra*, pp. 5-6, 10) In addition, the Court decided that the receipt of the incompetent evidence was not prejudicial. (App. A, *infra*, p. 7)

The affirmance of Count Two was based on the testimony of Lehman Casey. (App. A, *infra*, p. 5) Casey testified that he helped steal and deliver a tractor in February, 1968. (Tr. 360; A. 41) According to the indictment

(R. 2; A. 100), the police report (Tr. 258; A. 32) and, inferentially, the bill of particulars filed by the government (R. 16; A. 101), the vehicle which Petitioner was charged with receiving by this count was stolen in August, 1967—six months before Casey committed his theft. Thus, the decision of the Court of Appeals may be considered as sanctioning either a variance between the proof and the charge insofar as the particular vehicle involved, or a variance between the dates charged in the indictment and those proven at trial. In either case, Petitioner was deprived of his right to be adequately apprised of the charge against him. See *United States* v. *Critchley*, 3rd Cir. 1965, 353 F.2d 358; *United States* v. *Neff*, 3rd Cir. 1954, 212 F.2d 297, 309.

A more serious prejudice developed from the introduction of the hearsay evidence, however. Because of the substantial variance between Casey's testimony and the alleged date of the theft, and Casey's motives for testifying (see Statement, *supra*, pp. 9-10), it is not improbable that the jury disregarded his testimony altogether. Proof of guilt of the three possessory offenses would then be dependent upon the presumption which is said to follow from recent possession. (See Point 3, *infra*.) The incompetent hearsay evidence—which was the only evidence of theft insofar as the Count Three vehicle was concerned, and the only evidence of theft which comported with the charge in Count Two—allowed the jury to consider that the Petitioner had three stolen vehicles in his possession rather than the one concerning which competent proof had been introduced. As a consequence, the inference which the jury was told it could draw from the Petitioner's possession of any one vehicle was inevitably strengthened, in the jury's mind, by his possession of three.

Yet, just as "the repeated passing of money does not tend to show [knowledge that other money] is counterfeit," (*Boyer* v. *United States*, D.C.Cir. 1942, 132 F.2d 12, 13), the possession of vehicles does not tend to show knowledge that any one is stolen. The possession of several *stolen* vehicles will show this knowledge, (See *Lisenba* v. *California*, 314 U.S. 219, 227 (1941)), and that is precisely what was accomplished by the admission of the hearsay testimony concerning two of the three vehicles in question.

The Court of Appeals bypassed this problem by relying on the trial judge's instruction to the jury to consider each count on its own merits. (App. A, *infra*, p. 7) But if an instruction to the jury not to consider incompetent, prejudicial evidence is inadequate to protect the rights of a defendant (*Bruton* v. *United States*, 391 U.S. 123 (1968); *Jackson* v. *Denno*, 378 U.S. 368 (1964)), it is difficult to imagine that an instruction directing the jury to isolate the evidence under each count would be any more effective than a direction to isolate the evidence as to each defendant. That the Government might have proved its case under Count One, or even under Counts One and Two, without the admission of the incompetent evidence is, we submit, irrelevant. See *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946). The inadmissible hearsay inevitably affected the jury by making it much more likely that they would infer guilty knowledge as to any one vehicle, or all, from the evidence of the Petitioner's possession of the vehicles described, albeit incompetently, as stolen.

3. An instruction to the jury that they could infer guilty knowledge from possession of recently stolen property denied Petitioner due process of law.

Knowledge of the allegedly stolen character of the three trucks in question was an essential element of the charge. The only direct evidence that Hood was aware of the nature of the three stolen Mack tractors being used by his company was the testimony of Lehman Casey, who had been discharged from the Chicago Police Force for suspected participation in a fraudulent accident ring, was serving a ten year sentence in the Federal penitentary at Leavenworth for smuggling heroin into the United States (Tr. 376-7; A. 47) and had been promised a favorable letter to his parole board if he testified on behalf of the Government (Tr. 375; A. 46). Casey said that Hood had made various incriminating statements to him concerning the purchase of stolen vehicles (Tr. 357, 372-374; A. 40, 44-6).

The defense showed that the circumstances of Hood's possession of the tractors was as consistent with innocence as with guilt. Frigid Food Express, Inc., was a large firm operating a total of seventy-five to eighty-five tractors and trailers, with terminals in Westville, Indiana and Louisville, Kentucky (Tr. 579; A. 83). Hood spent little time at the Westville terminal where the stolen tractors were found (Tr. 460, 572, 573; A. 63, 81-2). The real manager of the Westville terminal in late 1967 and early 1968 was Charles Edwards, the dispatcher (Tr. 460; A. 63).

Edwards had access to the blank tractor registration and title certificates kept at the terminal (Tr. 559; A. 77-8). Edwards and one Jerry Green were seen painting two

Mack tractors at night in the terminal garage by a Frigid Food Express mechanic. Green and Edwards told the mechanic that the tractors belonged to them (Tr. 588-590; A. 85-6).

Furthermore, the only way to definitely identify tractors of this type is by the serial number engraved on the underside of their frame. However, it was not the practice in the trucking business to check this number, but rather to use the door plate serial number, which was easily changed, for identification and verification against the registration certificate. (Tr. 436, 450, 521, 522; A. 59, 61, 73). Thus, innocent possession of a stolen tractor is readily conceivable if the door plate number does not indicate the true identity of the tractor.

However, the jury was able to ignore this evidence and draw an inference of knowledge from the mere possession of the tractors by Hood's firm. The trial court instructed the jury that, "Possession of property recently stolen, if not satisfactorily explained, is a circumstance from which the jury may reasonably draw the inference and find that the person in possession knew the property had been stolen." (Tr. 697; A. 89-90)

An inference of knowledge from possession should not be sustained unless there is a "rational connection" between the fact proved and the fact presumed. *Tot* v. *United States*, 319 U.S. 463 (1943). It must "* * * at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact." *Leary* v. *United States*, 395 U.S. 6, 36 (1969).

Possession of recently stolen property does not make it more likely than not that the possessor knows the property is stolen. There is no more a connection between the two than there is between possession of marijuana and

knowledge that it is imported, *Leary* v. *United States*, 395 U.S. 6, or between presence at an illegal still and possession, custody and control of that still, *United States* v. *Romano*, 382 U.S. 136 (1965). In both *Leary* and *Romano* the invalid inference was strained and arbitrary; the fact inferred did not logically follow from the fact proven. Similarly, guilty knowledge does not logically follow from possession of recently stolen property.

An inference must be measured by the "circumstances of life as we know them." *Tot* v. *United States*, 319 U.S. 463, 468. Reason and experience must make it more likely than not that the fact inferred follows from the fact proved. A blanket inference of guilty knowledge from mere possession of recently stolen property fails to meet this standard. There are too many plausible explanations for the possession of recently stolen property for the inference to satisfy the requirements of due process.

We recognize that this instruction has generally been considered valid. *Wilson* v. *United States*, 162 U.S. 613, 619; *United States* v. *Minieri*, 2nd Cir. 1961, 303 F.2d 550, 554. However, in the light of *Leary* and *Romano*, and in consideration of the facts of this case, it is evident that an inference as to knowledge should not be drawn merely from the length of time that has elapsed between the theft and the possession, but rather it should be drawn from the circumstances surrounding the possession.

Had the jury been told that they could consider the circumstances of the defendant's coming into possession—the manner of transfer, the amount of consideration, the identity and reputation of the transferor and the presence of a proper certificate of title—as indicative of his knowledge, no question as to the rationality of the presumption

could be raised. But mere length of time, which has nothing to do with circumstances, does not rationally lead to the conclusion that the possessor has knowledge. In fine, possession of property five hours after it has been stolen, without more, is no more indicative of knowledge than is possession five months after the theft. Very recent possession may lead to the presumption that the possessor was the thief (and thus, of course, has knowledge), but that was not the theory upon which the Government presented this case to the jury.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for certiorari should be granted.

Respectfully submitted,

CHARLES A. BELLOWS
Attorney for Petitioner

JASON E. BELLOWS
SHERMAN C. MAGIDSON
HERBERT R. BARSY
On the Brief

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969 — SEPTEMBER SESSION, 1969

No. 17370

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM MITCHELL HOOD,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

FEBRUARY 13, 1970

Before SWYGERT, FAIRCHILD, *Circuit Judges*, and WILL, *District Judge*.[1]

SWYGERT, *Circuit Judge*. The defendant, William Mitchell Hood, was charged in a three-count indictment with knowing receipt and concealment of stolen motor vehicles in violation of 18 U.S.C. § 2313. The district court imposed a concurrent prison sentence of three years on each count after a jury verdict finding Hood guilty on all three counts. The defendant appeals, raising three issues: (1) the admission of evidence obtained from a search conducted on the basis of an allegedly invalid search warrant; (2) the sufficiency of the evidence to support convictions on counts II and III; and (3) the correct-

[1] Judge Hubert L. Will is sitting by designation from the United States District Court for the Northern District of Illinois.

ness of an instruction which allowed the jury to infer from possession of property recently stolen that the person in possession knew the property was stolen.

The Search Warrant

William Mitchell Hood was president and general manager of Frigid Food Express, Inc., a trucking firm. The Federal Bureau of Investigation suspected Hood of purchasing stolen tractors and using them in Frigid Food's interstate motor carriage operations. On the basis of an affidavit narrating information obtained from three unnamed informants and signed by Robert E. Radde, a special agent of the FBI, and Lee H. Cole, a detective sergeant of the Indiana State Police, a search warrant was secured from a United States Commissioner. The vehicles described in the indictment were seized in a raid on Frigid Food's terminal in Westville, Indiana conducted on March 7, 1968 pursuant to the search warrant.

The affidavit sworn by Radde and Cole was the only material presented upon which the Commissioner could make a finding of probable cause. The affidavit contained the following allegations: that a reliable informant had seen tractors which affiants knew to be stolen on the premises of Frigid Food's terminal in Westville, Indiana; that the informant had "on various occasions in the past furnished information leading to the recovery of similar type stolen property"; that another informant, believed by affiants to be reliable, stated that employees of Frigid Food were engaged in stealing tractors and that he personally observed one of the stolen tractors on Frigid Food's premises; and that another informant, believed to be reliable, observed the use of many tractors known to him to be stolen in Frigid Food's operations.

It is settled law that probable cause for the issuance of a search warrant may be based on hearsay furnished

by a confidential informant, *Jones* v. *United States*, 362 U.S. 257 (1960). In *Aguilar* v. *Texas*, 378 U.S. 108 (1964), the Supreme Court set forth explicit standards by which to test the reliability of informant hearsay used to establish probable cause. The magistrate to whom the application for a search warrant is presented "must be informed of some of the underlying circumstances from which the informant concluded" that contraband was present on the premises and "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable'," 378 U.S. 108, 114 (1964). Consequently, we must apply the two-pronged test of *Aguilar* to the affidavit in this case.

We think that the circumstances underlying the first informant's statement form a sufficient factual basis to support his allegation that stolen tractors were present on Frigid Food's premises. The showing required in support of the informant's accusation is subject to the same probable cause standards used in appraising a police officer's own observations. Since the first informant told affiants that he had personally seen tractors which the affiants knew to be stolen, the first aspect of the *Aguilar* test is clearly satisfied even if the statements of the other informants are ignored. Hood argues that the informant must not merely see the tractors but know on the basis of personal knowledge that they are stolen in order for the *Aguilar* standard to be met. This argument was implicitly rejected in *Rugendorf* v. *United States*, 376 U.S. 528 (1964), where there was no evidence that the informant knew, on the basis of personal knowledge, that the furs which he observed on defendant's premises were stolen.

With respect to the reliability of the informants, the officers swore that one of the informants had, "on various occasions in the past furnished information leading to the recovery of similar type of stolen property." This

representation alone perhaps constitutes a sufficient underlying circumstance to meet the *Aguilar* requirement. *Jones* v. *United States,* 362 U.S. 257, 271 (1960). We need not rest our ruling, however, on this solitary statement. The informant's reliability was further strengthened by the hearsay information furnished by the other two informants since their statements tended to corroborate the hearsay supplied by the first informant. In *Rugendorf* v. *United States;* 376 U.S. 528 (1964), the Supreme Court sustained a finding of probable cause based upon an affidavit containing interrelated hearsay information from a number of undisclosed informants. The affidavit contained representations that each informant had supplied the FBI with reliable information in the past. There, as here, the interlocking nature of the secondhand information from several sources fortified the reliability of each informant.

One difference between *Rugendorf* and the instant case must be noted. With reference to two of the informants in the case at bar the officers said only that they believed them to be reliable without giving reasons for their belief. Were we to appraise the reliability of these two informants independently, a challenge to their reliability could properly be raised. However, these informants' reliability must be considered in the context of the information supplied by them as well as by the informant whose reliability was vouched for by reference to past occurrences. When thus considered, the insufficient basis offered in the affidavit for the reliability of the latter two informants becomes less significant and does not bar the use of their information for corroborative purposes when determining the reliability of the first informant.

For the reasons stated, the requirements set forth in *Aguilar* are fully met and a sufficient basis existed for the Commissioner to issue the search warrant.

The Insufficiency of the Evidence

The defendant contends that the Government failed to prove by competent evidence the charges in counts II and III of the indictment and that its failure to do so prejudiced the jury in determining his guilt under count I. With respect to counts II and III the Government was required to prove that the vehicles named in the indictment were stolen and that they were moving as interstate commerce in the manner alleged in the indictment. The owners of the trucks in counts II and III did not testify at the trial.

We think the Government satisfied its burden of proof on count II. Count II alleged that on or about August 28, 1967 Hood received a stolen 1966 Mack tractor moving as interstate commerce from Chicago to Westville, Indiana. In support of this charge, a Government witness, Lehman Casey, testified that he stole a 1966 Mack tractor and delivered it to Hood, suggesting that it be registered in the name of Jack Bell, a fictitious person. Casey further testified that Hood paid him $2,000 for the vehicle although its market value was approximately $20,000. Another Government witness, Thomas Wheeler, testified that in 1967 he sold an old and dilapidated truck to the defendant. At the time the vehicle described in count II was seized pursuant to the search warrant, it was registered in the name of Jack Bell and possessed a vehicle identification number identical to the Wheeler truck. Over the objection of the defendant, the district court permitted a special agent of the National Auto Theft Bureau to testify that, according to a Chicago police report, a vehicle answering the description contained in count II was owned by a Clair Robinson of Newcastle, Pennsylvania and had been stolen on August 27, 1967. Even without the police report there was sufficient circumstantial evidence to sup-

port the conviction under count II. Accordingly, it was harmless error to permit the hearsay evidence to be introduced.

The Government failed to satisfy its burden on count III. Count III alleged that Hood received and concealed a stolen 1961 Mack tractor, serial number G753LST1418, which was moving in interstate commerce from Calumet City, Illinois to Westville, Indiana. The sole evidence presented by the Government to demonstrate that the tractor was stolen was the testimony of an insurance agent. The agent, whose company insured the vehicle named in the indictment, testified over the defendant's objection that the company's files showed that the owner, Albert Hogan, reported the tractor missing from Calumet City, Illinois on September 3, 1967.

In the search conducted at Frigid Food's terminal, a red, 1961 Mack tractor was seized. The tractor bore Indiana license plates issued for a 1962 Mack tractor, serial number G754LST153, registered to Frigid Food Express, Inc. The door post serial number on the tractor was 673LST1498. The serial number engraved on the frame had been filed off, but when raised by an acid etching procedure it was revealed to be G753LST1418, the serial number assigned to the Hogan tractor.

No foundation was laid for the introduction of the testimony of the insurance agent under the Business Records Act, 28 U.S.C. § 1732, exception to the hearsay rule. Even if the Government had attempted to lay a foundation, there is a significant question whether the Business Records Act is applicable in this instance. Therefore, permitting the use of hearsay evidence to prove the theft of the tractor described in count III was erroneous, and since there was no other evidence, direct or circumstantial, offered to establish this fact, the Government failed to prove the charges contained in that count.

The defendant argues the evidence presented to prove count III and the incompetent evidence presented to prove count II prejudiced the jury's consideration of count I. With respect to the competent evidence presented to prove count III (which consisted primarily of the evidence of seizure of Hogan's tractor), we think that evidence could properly be introduced to prove intent under count I. *United States* v. *Phillips,* 375 F.2d 75, 79 (7th Cir. 1967). Hood argues, however, that proof of intent in count I cannot be made by the incompetent hearsay evidence presented in counts II and III and that his conviction on count I was contaminated by this admission "which the jury unquestionably considered in their deliberation on count I."

We are not persuaded by this argument. The court properly instructed the jury to consider each count separately and that the Government had to prove its case with respect to each count. We think this instruction adequately protected the defendant, and that, although the admission of the hearsay evidence was erroneous, prejudicial error did not occur.

The Jury Instruction

The defendant contends that it was error for the district court to instruct the jury[2] that "possession of property

[2] The phrase in question is included in the jury instruction which reads in pertinent part:

> Possession of property recently stolen, if not satisfactorily explained, is a circumstance from which the Jury may reasonably draw the inference and find that the person in possession knew the property had been stolen. The same inference may reasonably be drawn from a false explanation of such possession.
>
> Possession in one State of property recently stolen in another State, if not satisfactorily explained, is a circumstance for which the Jury might reasonably draw the inference and

recently stolen, if not satisfactorily explained, is a circumstance from which the jury may reasonably draw the inference and find that the person in possession knew the property had been stolen." We think the instruction was properly given in this case.

Hood argues that the instruction is invalid because the fact proved, possession of recently stolen property, is not "rationally connected" to the fact presumed, knowledge that the property is stolen. Therefore, Hood contends that an instruction allowing a jury to draw such an inference violates due process under recent Supreme Court cases, *Leary* v. *United States*, 395 U.S. 6 (1969); *United States* v. *Romano*, 382 U.S. 136 (1965); *Tot* v. *United States*, 319 U.S. 463 (1943).

(Footnote 2 continued)

find, in the light of surrounding circumstances, that the person in possession knew it to be stolen property.

The term "recently" is a relative term which has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all the facts and circumstances shown by the evidence. The longer the period of time since the theft, the weaker the inference which may be drawn from unexplained possession.

* * *

In considering whether possession of recently-stolen property has been satisfactorily explained, the Jury will bear in mind that in the exercise of Constitutional rights, the accused need not take the witness stand and testify.

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused.

It is the exclusive province of the Jury to determine whether the facts and circumstances shown by the evidence warrant any inference which the law permits the Jury to draw from possession of recently-stolen property.

If any possession the accused may have had of recently-stolen property is consistent with innocence, the Jury should acquit the accused.

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If any possession the accused may have had of recently-stolen property is consistent with innocence, the Jury should acquit the accused.

The cases cited by the defendant involve the constitutionality of presumptions created by statute. In such statutory presumption cases the court must ask whether the legislature could determine "with substantial assurance that the presumed fact is more likely than not to flow from the proved fact. . . ." *Leary* v. *United States*, 395 U.S. 6, 36 (1969). When testing a common law presumption in a jury instruction a court is faced with a different question, namely, whether the facts before it indicate that the presumed fact is more likely than not to flow from the proven fact in the given case. Since a legislative enactment is not involved and the accompanying policy against legislative interference with the presumption of innocence is inapplicable, the abstract rule of law embodied in the jury instruction need not be tested apart from the facts before the court. Thus the jury instruction before us has been accepted in a myriad of cases, *e.g.*, *Wilson* v. *United States*, 162 U.S. 613, 619 (1896); *United States* v. *Meek*, 388 F.2d 936 (7th Cir. 1968); *United States* v. *Slaughter*, 255 F.2d 770 (7th Cir. 1958); *United States* v. *Minieri*, 303 F.2d 550 (2d Cir. 1962).

Since we have held that Hood was erroneously convicted on count III, we need only consider whether the instruction was properly given with respects to counts I and II. The evidence demonstrates that the tractor in count I was recently stolen. The record shows that the 1963 Mack tractor charged in count I was stolen from a repair shop in Louisville, Kentucky on February 10, 1968 and that the vehicle was received by Frigid Food shortly thereafter. Similarly, as we have already discussed, the evidence demonstrates that the tractor in count II was recently stolen.

Although the testimony is somewhat conflicting, we believe the jury could find that the vehicles in question

were in Hood's possession and under his individual control. At the time of the search the vehicles in counts I and II were found at Frigid Food's terminal operated by the defendant. The secretary-treasurer of Frigid Food testified that Hood had purchased all the tractors possessed by the firm. A Government witness further testified that Hood offered to pay him $2,000 for two or three tractors which the witness would acquire by theft.

From the proof that the vehicles in counts I and II were recently stolen and in Hood's possession the jury could conclude that it was more likely than not that Hood knew the vehicles were stolen. That the fact presumed is rationally connected to the fact proved in this case is readily apparent from common experience. The transferee of a motor vehicle invariably knows the origin of the vehicle which comes into his possession. The manner of transfer, including the amount of consideration given for the vehicle, the identity and reputation of the transferor, and the presence of the proper certificate of title governing the vehicle, strongly indicate to the transferee whether or not the vehicle was stolen. These considerations, though rarely mentioned, are self-evident and explain the universal judicial acceptance of presumption similar to the one contained in the jury instruction in the instant case.

For the reasons stated the convictions under counts I and II are sustained and the judgment under count III is vacated. It is well settled that when the sentences imposed on multiple counts of an indictment are of equal length and are to run concurrently, the failure of proof of one or more of the counts does not require reversal if there is sufficient proof of one count. *United States* v. *Smith*, 253 F.2d 95 (7th Cir. 1958); *Kramer* v. *United States*, 147 F.2d 202 (9th Cir. 1945).

The judgment is affirmed.

WILL, *J.*, dissenting in part. There are two ways of effectively eliminating the Fourth Amendment from the law of the land. One is to repeal it, a difficult if not impossible undertaking. The other is to reduce it to a formalism, compliance with which may be accomplished by law enforcement officers incanting certain ritualistic conclusory phrases with no substantiation of their truth or substance.

The procedure followed in the instant case and approved by the majority illustrates how easily the latter result may be achieved. Here, two warrants authorizing search for the same allegedly stolen property at two geographically separate locations were issued by the United States Commissioner on the basis of a single joint affidavit signed by a Special Agent of the Federal Bureau of Investigation and a Detective Sergeant of the Indiana State Police. The affidavit described information purportedly given to the affiants by three separate unnamed informers.

The first of these was described in the affidavit as "a reliable informant" who had "on various occasions in the past furnished information leading to the recovery of similar type stolen property." The affidavit further stated that this informant had "stated to the undersigned" that from July 1967 to February 1968, he had seen certain tractors on the premises of defendant's company. At the hearing on the motion to suppress, it appeared that the affidavit was in part false since neither of the affiants had ever spoken to this informer, the information both as to his past services and the tractors he had seen on the defendant's premises having been passed on to them by another F.B.I. agent.

The affidavit further averred that the affiants knew the tractors seen by the informer to be stolen although most of them were identified by no more than the name of the manufacturer, the model year and, in some instances, their

color, *e.g.*, 1967 Mack U-8 Tractor, dark green, 1967 White Tractor, pea green, 1966 and 1967 Autocar Tractors.

The second informer is described in the affidavit simply as "Another informant, whom your affiants believe to be reliable . . . " and the third as "Another informant, believed by your affiants to be reliable. . . . "

As the majority recognizes, a search warrant may be properly issued only by a neutral and detached magistrate after an independent finding of probable cause to believe that contraband or stolen merchandise is on the premises. *Johnson* v. *United States*, 333 U.S. 10, 13 (1947). While probable cause may be based in part on hearsay, *Jones* v. *United States*, 362 U.S. 257 (1960), the magistrate must be informed of some of the underlying circumstances on which the informant based his conclusions, as well as some of the underlying circumstances from which the officer making the affidavit concluded that the informant was reliable. *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1963); *Spinelli* v. *United States*, 393 U.S. 410, 413 (1969).

It seems obvious to me that neither of these minimum criteria are met by the affidavit in this case. There is no underlying information as to how any of the informants or the affiants knew any of the tractors in question were stolen. The meagerness of the description of many of them should cast serious doubt or at least compel inquiry by a "neutral and detached magistrate" as to the basis of the conclusion. Even as to those identified, there is no underlying information as to where or when they were stolen or how the affiants or the informants could "know" that they were. The Commissioner apparently simply accepted the conclusory averments in the joint affidavit without learning any "underlying circumstances."

The absence of "underlying circumstances" as to the reliability of the three informants is equally total. This

Court previously found inadequate an averment without further underlying information "that said informant has in the past furnished the affiant with reliable and accurate information and that he knows the informant to be a reliable source." *United States* v. *Roth*, 391 F.2d 507 (C.A. 7, 1967). That is substantially the same as the description of the first informant here. The other two, as previously noted, are simply described as informants whom the affiants believe to be reliable.

The majority, apparently recognizing that none of these alone is an adequate basis to establish the reliability of any of the informants, concludes that the fact that all three allegedly gave similar information establishes their reliability. But nothing plus nothing plus nothing is still nothing.

I assume that the reason why the Supreme Court has stressed the necessity for the magistrate to be advised in the affidavit of the "underlying circumstances" is to prevent the kind of formalistic exercise which took place here. The magistrate here did not know, 1) the names of any of the informants, 2) any specific facts on which the affiants based their beliefs as to the reliability of any of the informants, or 3) any specific facts on which either the affiants or the informants based their conclusion that stolen property was on the premises to be searched.

If information from anonymous informants is to furnish the basis for probable cause, specific facts must be included in the affidavit on which the conclusions of reliability and the presence of stolen property can be tested by the magistrate or we shall open the door to the issuance of search warrants whenever law enforcement officers desire them. While I have no serious doubt that the three informants actually existed in the instant case, the United States Commissioner had no basis for an independent determination that they did, that they were reliable or

that stolen property would be found on either or both of the premises he authorized to be searched. Conclusory representations that anonymous informants are "reliable," "believed to be reliable" or have "in the past furnished information leading to the recovery of similar type property," or that property "known" by the affiants or the informants to have been stolen is on the premises do not, in my opinion, satisfy the requirements of probable cause or constitute the "underlying circumstances" which *Aguilar* and *Spinelli* demand. If they do, the Fourth Amendment has been reduced to a formalism, compliance with which can be achieved by the recitation of certain ritualistic phrases, and the magistrate will be merely a rubber stamp for law enforcement officers seeking a search warrant.[1]

While I agree with the rest of the majority's conclusions, for the reasons heretofore stated, I dissent from their determination that the affidavit was adequate and would therefore reverse.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

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[1] Protecting the anonymity of informants, a desirable objective, need not nullify the Fourth Amendment. Supplementary oral testimony under oath in which the necessary underlying circumstances are disclosed to the magistrate can be taken, a transcript made thereof and, appropriate, that transcript examined in camera by the trial judge. In the instant case, oral testimony was presented to the Commissioner but no record was kept thereof, and at the hearing on the motion to suppress he could not recall any specific information presented to him other than that contained in the affidavit. We must, therefore, as the majority recognizes, determine the validity of the search warrants solely on the adequacy of the affidavit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Friday, February 13, 1970

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 17370 vs.

WILLIAM MITCHELL HOOD,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS

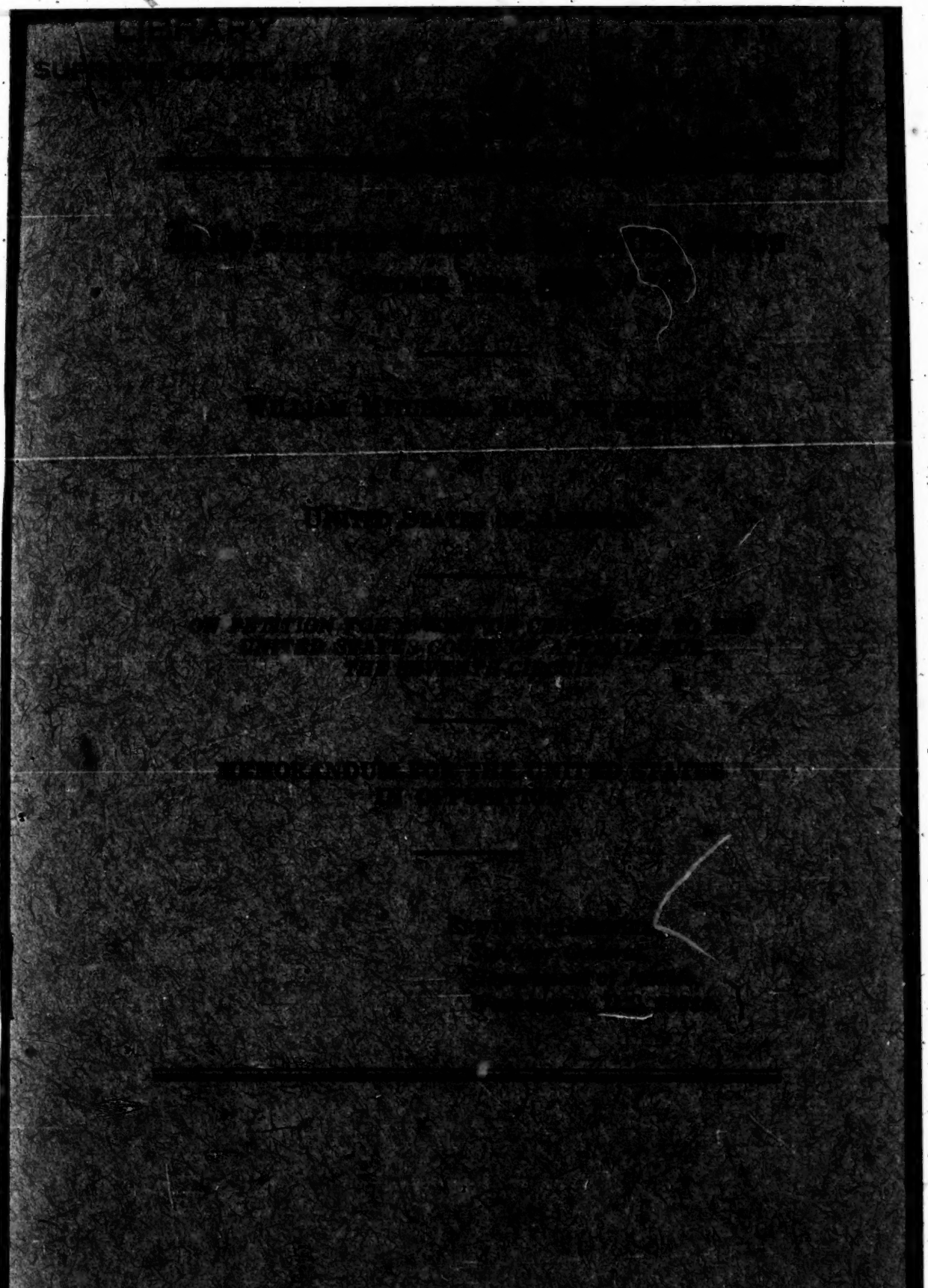
For the Seventh Circuit

Chicago, Illinois 60604

Thursday, March 26, 1970

* * *

IT IS ORDERED by the Court that the petition for rehearing in the above-entitled case be, and the same is hereby denied.



In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1610

WILLIAM MITCHELL HOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on three counts charging receipt and concealment of Mack truck tractors moving in interstate commerce, 18 U.S.C. 2313, and sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed as to two counts but reversed the third for insufficiency of the evidence.

1. The principal issue, as to which there was a dissent below, relates to the sufficiency of the affidavit to support the search warrant, sworn to by an FBI agent and a state trooper. The affidavit described the model, year, maker's name, and color of truck tractors believed to be on the premises of Frigid Food, and stated that the affiants themselves knew that these tractors had been stolen.[1] Their information as to presence of these trucks, they said, had been received from three different informants. One, described as a reliable informant who "on various occasions in the past furnished information leading to the recovery of similar type stolen property," had seen most of the described tractors on the premises of Frigid Food. As to the other informants, the affiants could say only that they believed them to be reliable. One of those informants reported that employees of Frigid Food were stealing truck tractors and that he had personally seen one tractor which had been stolen in Cincinnati, and three which had been stolen in Chicago, at the premises. The other observed the use by Frigid Food of many tractors known to him to have been stolen.[2] While the court of appeals' majority thought that there was an insufficient basis shown for concluding that the latter two informants were reliable if the information about them was viewed in the ab-

[1] The affidavit described two of the tractors by the Frigid Food express unit and a third by vehicle, transmission and engine numbers.

[2] The vehicles identified by this informant included two which had been identified by unit number by the first informant.

stract, it held that their statements could be considered as adding corroboration to the reliability of the first informant (Pet. App. 4). This conclusion is clearly reasonable.

Petitioner in this Court stresses the contention that the affidavit does not specify how the informants knew the vehicles had been stolen (Pet. 14-16). This argument overlooks the fact that it was the *affiants* who stated that they had been stolen. A magistrate could reasonably conclude that an FBI agent and state policeman would be able to ascertain whether a vehicle had been stolen on the basis of the descriptions supplied by the informants.

2. The court of appeals held that testimony by an agent for the National Auto Theft Bureau as to a report of the theft of the tractor involved in count 2, and testimony from insurance records as to the theft of the vehicle involved in count 3, were inadmissible hearsay insofar as this evidence was used to establish the fact of theft. It reversed the conviction on count 3 on this basis but not the conviction on count 2 since there was, as to that count, independent evidence of theft. Petitioner argues that the admission of the hearsay testimony was prejudicial as to count 1 (Pet. 18-21), since the jury would be more likely to infer guilty knowledge from possession of three vehicles than one. Petitioner's argument endeavors to read out of the case the independent evidence of theft shown in count 2. Moreover, even accepting the view of the court of appeals that the testimony from insurance records could not prove the fact of guilt, it does not follow that the evidence would be inadmissible as

bearing on petitioner's knowledge and intent. The circumstance that petitioner's firm possessed, in addition to the truck tractor charged in count 1, two other tractors with altered frame serial numbers and which had been reported to be stolen (see Pet. 9-11) would be relevant on intent even if the report was not proof of theft.

3. As petitioner admits, (Pet. 23) an instruction as to the inference which may be drawn from recent possession of stolen property has consistently been upheld. (See also Pet. App. 9.) The instruction given here made clear to the jury that it was not bound to draw such an inference and that the jury could find possession consistent with innocence (Pet. 13).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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